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AT SEATTLE
CLERK U.S. DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON

BY DEPUTY

DISTRICT COURT OF THE STATE OF WASHINGTON
SEATTLE DIVISION

UNITED STATES OF AMERICA, *ex rel.*
by BRENT STONE,

Plaintiffs,

v.

YAKIMA PRODUCTS, INC.,

Defendant.

Case No. 2:21-cv-00524-JLR

**DEFENDANT'S REPLY IN SUPPORT
OF LIMITED OBJECTION TO THE
GOVERNMENT'S MOTION TO
UNSEAL AND MOTION TO SEAL
PRIVILEGED MATERIAL**

INTRODUCTION

Relator, on his own and without seeking prior judicial determination, revealed defendant Yakima Products, Inc.'s ("Yakima") privileged communications to the government and in a document intended to be filed publicly. Despite Yakima's claims of privilege, he asserts he is entitled to do so for two reasons: (1) Yakima waived its privilege when its lawyer prepared and sent a letter to a third-party; and (2) in any event, Yakima's attorney client privilege is vitiated because the crime-fraud exception applies. Both arguments fail.

As an initial matter, the Relator's waiver and crime fraud arguments are based, in large part, on a letter attached to the declaration of Steven Teller ("Teller Declaration") prepared by Yakima's lawyer that Relator alleges was sent to Moss Adams, Yakima's auditor. It was not. **The letter on which the Relator relies was an internal draft and was never sent to Moss**

1 **Adams.**¹ It is a privileged document. But, even if the letter had been provided to Moss Adams, it
2 would not amount to a broad-scale subject matter waiver of privilege as to Yakima's internal
3 investigation.

4 Relator's claims that the crime fraud exception applies similarly fail. His arguments are
5 conclusory. Without offering any sufficient, admissible evidence, he asks this Court to conclude
6 that the failure to disclose certain duties owed necessarily means the crime-fraud exception
7 applies. More is required.
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9 Yakima, on the other hand, has submitted actual, admissible evidence that the
10 communications at issue are privileged, the privilege was not waived, and the crime-fraud
11 exception is not applicable. Through the previously filed Declaration of George Tuttle, and the
12 Supplemental Declaration of George Tuttle ("Tuttle Sup Decl"), filed with this Reply, Yakima
13 has made a sufficient showing that specific paragraphs in the Amended Complaint impermissibly
14 reveal Yakima's attorney-client privilege and, as a result, it should remain sealed. To the extent
15 other documents filed in this case also contain the unauthorized disclosure of Yakima's attorney-
16 client privileged information, including the Relator's Response to Yakima's Motion and Exhibit
17 A to the Teller Declaration, those should remain sealed as well.²
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22 ¹ It is notable that Relator's counsel admits that the only copy he has is a word version and he
23 had to insert the date. There is no indication he attempted to verify that the letter attached was a
24 final, submitted version. And he did not ask Yakima's counsel if Yakima contended it was
privileged.

25 ² Because the case is sealed, including the Relator's initial Complaint, Yakima has not seen most
26 of the pleadings in this case. If, for example, the initial Complaint filed by the Relator contains
27 allegations similar to those in the Amended Complaint, Yakima asks this court to seal those
allegations as well.

ARGUMENT

A. The Realtor Cannot Vitiating Yakima's Attorney Client Privilege.

1. A judicial determination is required before a party discloses potentially privileged information.

"[T]he attorney-client privilege is, perhaps, the most sacred of all legally recognized privileges, and its preservation is essential to the just and orderly operation of our legal system." *United States v. Bauer*, 132 F.3d 504, 510 (9th Cir. 1997); *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) ("The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed by the client."). "The attorney-client privilege is essential to preservation of liberty against a powerful government. People need lawyers to guide them through thickets of complex government requirements, and, to get useful advice, they have to be able to talk to their lawyers candidly without fear that what they say to their own lawyers will be transmitted to the government" or otherwise become public. *United States v. Chen*, 99 F.3d 1495, 1499 (9th Cir. 1996).

Despite the importance of the privilege, the Relator repeatedly disclosed communications that were privileged or, at minimum, potentially privileged on their face, in Court filings and in turn, to the government without first seeking a judicial determination whether they were subject to Yakima's attorney-client privilege. What is more, the Relator continues to use documents he stole from Yakima that were prepared by Yakima's attorney by self-declaring that they are not privileged, despite the fact: (1) Yakima continues to assert its privilege; (2) the document states on its face it is privileged; and (3) the factual basis underlying the claim of waiver is inaccurate. Compare Teller Decl, ¶2(a) and Ex. A to Tuttle Sup Decl, ¶2-4 and Ex. 1.

This is improper. Allowing a disgruntled employee to determine on his own that communications to and from corporate lawyers are not privileged and, in turn, publicly use those

1 communications for financial gain and/or provide them to the government, is a dangerous and
2 dubious precedent that severely undercuts the purpose and the protections of the attorney-client
3 privilege.

4 Litigants, even relators in qui tam actions, must seek a judicial determination before
5 reviewing and using potentially privileged information. *See United States ex rel. Hartpence v.*
6 *Kinetic Concepts, Inc.*, No. CV 08-1885-GHK AGRX, 2013 WL 2278122, at *2 (C.D. Cal. May
7 20, 2013) (disqualifying relators' counsel for using privileged information and cautioning
8 counsel "[t]he path to [an] ethical resolution is simple: when in doubt, ask the court.")(citing
9 *Gomez v. Vernon*, 255 F.3d 1118, 1135 (9th Cir. 2001)); *In re Examination of Privilege Claims*,
10 No. MC15-15-JPD, 2016 WL 11164791 (W.D. Wash. May 20, 2016) (finding disqualification of
11 relator's attorney was not necessary where relator and government sought direction from the
12 Court about the privileged nature of a document and did not materially use privileged materials
13 in pleadings or investigation)³ report and recommendation adopted, No. C12-2091-JCC, 2016
14 WL 8669870 (W.D. Wash. July 22, 2016); *In re Search Warrant Issued June 13, 2019*, 942 F.3d
15 159, 176-78 (4th Cir. 2019) ("when a dispute arises as to whether a lawyer's communications or
16 a lawyer's documents are protected by the attorney-client privilege or work-product doctrine, the
17 resolution of that dispute is a judicial function."); *In re The City of New York*, 607 F.3d 923, 947
18 (2d Cir. 2010) (noting that evaluating privilege claim is always a judicial function); see also *U.S.*
19 *ex rel. Frazier v. IASIS Healthcare Corp.*, 2012 WL 130332, * 15 (D.Ariz.2012) (explaining in
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25 ³ Relator's attorney also failed to notify counsel for Yakima that his client took and kept
26 potentially attorney-client information such that Yakima could have taken sufficient action to
27 protect its privilege and Relator could have obtained a Court ruling on the propriety of Relator's
use of the privileged information.

1 qui tam case counsel should have sought “a ruling from the Court about the privileged
2 documents”). No such efforts were made in this case.

3 Because the parties had largely resolved the dispute and reduced it to writing by the time
4 Yakima discovered the improper use of these materials, Yakima sought a very modest remedy to
5 right this wrong and protect its privilege—seal portions of the Amended Complaint, and similar
6 documents. Relator’s Response makes clear however that he and his attorney have access to
7 many, if not all, of Yakima’s privileged documents (Tuttle Sup Decl ¶¶2-4) and they have no
8 hesitation to continue to use them for their own purpose despite Yakima’s asserted, ongoing and
9 unresolved claims of privilege.⁴ Accordingly, the Relator and his counsel should immediately
10 delete or return these documents, cease using the documents, and affirm under oath that they
11 have done so. In addition, the modest remedial measure Yakima seeks, sealing the Amended
12 Complaint and documents containing similar information, including Exhibit A attached to the
13 Teller Declaration and portions of the Relator’s Response, should be granted.
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16 **2. The Relator cannot demonstrate the crime-fraud exception applies.**

17 Relator tries to side-step the requirement he should have sought a judicial determination
18 of privilege by invoking the crime-fraud exception. But none of the privileged communications
19 the Relator apparently has access to, including those outlined in the Amended Complaint,
20 submitted with the Response, or in any other location, are subject to the crime fraud-exception.
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24 ⁴ On page four of the Response, counsel notes that Relator has a draft document prepared by
25 Attorney Tuttle. See, Response p. 4 (“Shortly after Yakima disclosed the details to the CPA in
26 February 2019, a draft final prior disclosure statement was prepared. That draft has not been
27 disclosed to the Court.”). Again, a draft document prepared by outside counsel is clearly
protected by the attorney-client privilege and work-product protection. *In re: Premera*, 329
F.R.D. at 662. Neither Relator nor his counsel should have any access to Yakima’s undeniable
attorney-client privileged information let alone continue to use them to prepare court pleadings.

1 The Relator, as the proponent of the crime-fraud exception, bears the burden of proving it
2 is applicable. See *United States v. Martin*, 278 F.3d 988, 1001 (9th Cir. 2002); *Chen*, 99 F.3d at
3 1502. “The mere allegation of fraud is not sufficient to terminate the attorney-client privilege.
4 Prima facie evidence of fraud, not mere suspicion of fraud, is required to abrogate the privilege.”
5 *Burlington Indus. v. Exxon Corp.*, 65 F.R.D. 26, 40 (D. Md. 1974) (citing *Clark v. United States*,
6 289 U.S. 1, 15 (1933)). “The exception applies only when there is reasonable cause to believe
7 that the attorney’s services were utilized in furtherance of the ongoing unlawful scheme.” *Martin*,
8 278 F.3d at 1001(citations and quotations omitted). Indeed, the communication itself must have
9 been in furtherance of a fraud or crime and must have been intended to facilitate the fraud or
10 crime.⁵ *United States v. Jacobs*, 117 F.3d 82, 88 (2d Cir. 1997) (quotations and citations
11 omitted).

13 To meet his burden, the Relator must make a sufficient factual showing to the Court
14 using non-privileged evidence that: (1) “the client was engaged in or planning a criminal or
15 fraudulent scheme when it sought the advice of counsel to further the scheme” and (2) “the
16 attorney-client communications for which production is sought are sufficiently related to and
17 were made in furtherance of the intended, or present, continuing illegality.” *In re Napster, Inc.*
18 *Copyright Litig.*, 479 F.3d 1078, 1090 (9th Cir. 2007) (cleaned up); *United States v. Shewfelt*,
19 455 F.2d 836, 840 (9th Cir. 1972); *Jacobs*, 117 F.3d at 87. The Relator has not done that. He has
20 failed to make a prima facie case that the crime-fraud exception applies “using unprivileged
21 communications.” Response, p. 7. Instead, he relies on a draft letter that was never sent and is
22 both privileged and work-product. See Tuttle Sup Decl ¶¶ 2-4; *In re: Premera*, 329 F.R.D. at
23 662; *Roth*, 254 F.R.D. at 541.

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27 ⁵ The crime fraud exception is interpreted narrowly. See *Chen*, 99 F.3d at 149.

1 Yakima vigorously disputes the Relators' allegations, but at most they show that
2 Attorney Tuttle provided legal advice about ADD/CVD and after internal conversations with key
3 stakeholders and Attorney Tuttle about that advice, Yakima took a different approach.⁶ The
4 Relator has offered nothing to show that Attorney Tuttle was doing anything other than what a
5 lawyer is supposed to do—offer legal advice to clients for them to consider before taking action.
6 Failure to heed the advice of a lawyer does not vitiate the attorney-client privilege. Courts
7 recognize “[t]he attorney-client privilege is strongest where a client seeks counsel’s advice to
8 determine the legality of conduct before taking action” and “the crime-fraud exception applies
9 only when there is probable cause to believe that the communications with counsel were
10 intended in some way to facilitate or to conceal the criminal activity.” *Jacobs*, 117 F.3d at 88
11 (quoting *In re Grand Jury Subpoenas Duces Tecum*, 798 F.2d 32, 34 (2d Cir. 1986)).
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13 What the Relator has done is offer privileged materials that he took from Yakima when
14 he was fired to support his qui tam complaint. And once Yakima pushed back on having that
15 privileged information made public, the Relator offered additional privileged materials he took
16 without permission—including an unsent draft—to support his argument the crime-fraud
17 exception applies. He has failed entirely to offer any evidence—privileged or otherwise— that
18 Yakima engaged Attorney Tuttle to commit a fraud and the privileged communications are in
19 furtherance of that fraud. Yakima, on the other hand, has presented sworn declarations that
20 contradict the Relator’s story: Attorney George Tuttle, a percipient witness and an expert in
21 customs and trade laws for more than 40 years, disputes the Relators’ (unsupported) factual
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25 ⁶ Aside from the privileged document attached to Teller Declaration, Relator merely restates in
26 his brief the same allegations in the Complaint as proof of the crime-fraud exception. These are
27 unsworn disputed allegations, some of them Yakima claims are based on privileged information.
This is a wholly insufficient showing to vitiate Yakima’s attorney-client privilege.

1 statements and legal analysis regarding the requirements of prior disclosures.⁷ Given this, Relator
2 has failed to make a sufficient showing to demonstrate the crime fraud exception applies.

3 **B. Yakima Did Not Waive Its Privilege.**

4 As an alternative, Relator contends Yakima waived any claims of privilege because the
5 information at issue was disclosed to a third-party. The problem with that argument is that it is
6 based on a factual error. The Relator claims that the word document he attached to his Response
7 was sent by Yakima to its accountants; it was not. Compare Teller Decl, ¶2(a) and Ex. A with
8 Tuttle Sup Decl, ¶2-4 and Ex. 1. The Relator can't base a claim of waiver on an unsent document
9 he took without permission from Yakima.
10

11 Yakima did provide limited information to its auditor Moss Adams stating that there was
12 a potential unasserted claim by CBP for ADD/CVD liability and disclosed the potential amount
13 of that liability. Tuttle Sup Decl, ¶2-4 and Ex. 1. But that information, information required to be
14 disclosed in the audited financials of corporations across the United States, does not and cannot
15 act as a subject matter waiver as advocated by Relator. *Chevron Corp. v. Pennzoil Co.*, 974 F.2d
16 1156, 1162 (9th Cir. 1992) (no subject matter waiver where privilege holder disclosed legal
17 memos to third party about tax liability). Nothing in the letter to Moss Adams revealed any of
18 Attorney Tuttle's actual advice to Yakima, his detailed analysis, the internal communications
19 between Yakima agents and him about the advice, or any other privileged matter. There was no
20 waiver.
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24 ⁷ Relator argues "Mr. Tuttle chose to file a prior disclosure for his client, knowing that it did not
25 represent the full disclosure required by the Prior Disclosure process and regulation, and
26 knowing that his statements in the document were untrue." Response, p. 7. There is no basis for
27 this statement in the first place and in any event, the Declaration and the Supplement Declaration
of George Tuttle, an expert in this area, refute Relator's unsupported, unsworn, inadmissible
assertions. See, Tuttle Decl, ¶¶ 1,3 and 4 and Tuttle Sup Decl, ¶¶ 5-11.

1 **C. The Information Requested to Be Redacted is Privileged**

2 The Relator also attempts to carve out certain information that was contained in the
3 Complaint as not-privileged because some involved communications between two corporate
4 agents with no attorney present. This does not defeat the claim of privilege. The Relator
5 concedes, as he must, communications between two corporate agents where no attorney is
6 present may be subject to the privilege. Response, p. 10. But he quibbles whether the information
7 being provided between corporate agents is being made for the purpose of obtaining legal advice.
8 This argument misses the point.
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10 The Ninth Circuit has unequivocally stated, “the attorney-client privilege is a two-way
11 street: [it] protects confidential disclosures made by a client to an attorney in order to obtain legal
12 advice, ... as well as an attorney's advice in response to such disclosures.” *Bauer*, 132 F.3d at 507
13 (citations and quotations omitted). Discussions involving the advice of Attorney Tuttle between
14 corporate agents and those to obtain legal advice are both confidential and subject to the
15 privilege.
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17 As outlined in the Declaration and Supplemental Declaration of George Tuttle, the
18 lawyer employed by Yakima to provide legal advice “to comply with United States customs and
19 duties laws following an inquiry by the U.S. Customs and Border Protection about potential
20 misclassifications of products imported by Yakima,” paragraphs 3.11, 3.18 through 3.26, 3.28,
21 and 3.29 contain Yakima’s attorney-client privileged communications. Below is the table
22 previously provided identifying, the basis for Yakima’s assertion of privilege:
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<u>Paragraph Nos.</u>	<u>Basis</u>
3.11	Confidential information provided to Yakima from Mr. Tuttle for the purpose of providing legal advice. (Tuttle Decl. ¶6; Tuttle Sup Decl ¶8 ⁸)
3.18	Confidential information communicated by Mr. Tuttle to Yakima for the purpose of rendering legal advice. (Tuttle Decl. ¶7)
3.20	Confidential information regarding potential drafts of Mr. Tuttle's communications on behalf of Yakima. (Tuttle Decl. ¶7)
3.21, 3.22, 3.26 and 3.28	Communications from Mr. Tuttle to Yakima providing legal advice and internal discussions with employees, including decision makers, about legal advice and proper course of action. (Tuttle Decl. ¶8)
3.23, 3.24, and 3.25	Information communicated to or by Mr. Tuttle for the purpose of rendering legal advice. (Tuttle Decl. ¶8)

As the Court can see, the identified allegations in the Amended Complaint are protected by the attorney-client privilege and accordingly and should remain sealed.⁹

CONCLUSION

The common-law right of public access to judicial records is “not absolute and can be overridden given sufficiently compelling reasons for doing so,” *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003), including where a court filing is “a vehicle for an improper purpose.” *Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 598 (1978). In this case, the Relator has and continues to improperly disclose and use Yakima's attorney-client privileged information. Privileged information “is inadmissible and has ‘no possible bearing upon the

⁸ The determination of whether specific imports are subject to ADD/CVD is not merely a fact as Relator asserts. In fact, it “is not easily determinable” and requires an in-depth analysis, and possibly the submission of a scope request to the Department of Commerce for clarification. Tuttle Sup Decl ¶8. Thus, the information in paragraph 3.11 is protected by both the attorney-client privilege and work product doctrine.

⁹ Yakima has attached a proposed redacted Amended Complaint to its Order on this Motion to comport with Yakima's requested relief.

1 subject matter of the litigation.”” *Phoenix Ins. Co. v. Diamond Plastics Corp.*, 2020 WL
2 4261419, at *2 (W.D. Wash. July 24, 2020) (citing *Fodor v. Blakey*, 2012 WL 1289386, slip op.
3 at 14 (C.D. Cal. 2012))(noting that privileged information in a Complaint is subject to a motion
4 to strike pursuant to Fed. R. Civ. Pro. 12(f)). Accordingly, the Court should direct the Clerk of
5 the Court to seal the identified paragraphs of the Amended Complaint and any other documents
6 containing Yakima’s privileged communications.

7
8 DATED: November 17, 2023,

9 Respectfully submitted,

10 /s/ Michelle Holman Kerin

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